

1 THE HONORABLE RICARDO S. MARTINEZ
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 ROBERT KENNY,

No. 2:14-cv-01987-RSM

10 Plaintiff,

NON-PARTY INDEPENDENT TRUSTEES
OF PIMCO FUNDS' OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF PRIVILEGED
COMMUNICATIONS

11 v.

12 PACIFIC INVESTMENT
MANAGEMENT COMPANY LLC;
13 PIMCO INVESTMENTS LLC,

NOTED ON MOTION CALENDAR:
October 7, 2016

14 Defendant.

15 ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

Plaintiff Robert Kenny's ("Plaintiff's") Motion to Compel (the "Motion" or "Mot.") asks this Court for an unprecedented order requiring the non-party Independent Trustees to the PIMCO Funds to disclose all privileged communications between or among them and their independent legal counsel. Plaintiff candidly admits that the communications at issue meet the traditional elements of the attorney-client privilege because they indisputably are both confidential and made for the purpose of requesting or receiving legal advice in connection with the Independent Trustees' service to the PIMCO Funds. Despite this concession, Plaintiff claims that the Independent Trustees—who have properly asserted their privilege—are not entitled to rely on it for the sole reason that they are the trustees of PIMCO Funds, which is organized as a Massachusetts Business Trust ("MBT"). Plaintiff's "fiduciary exception" argument is startlingly broad and, if adopted, would effectively eliminate the attorney client privilege for the independent trustees of all of the many thousands of mutual funds organized as a business trust—a very common form of business organization in the industry. Under Plaintiff's view, all of the millions of mutual fund investors in the country are entitled to heretofore confidential, privileged communications simply by demanding them. There is no support in precedent, statute or logic for this extraordinary demand. No court in this District, this Circuit or elsewhere, has ever recognized a "fiduciary exception" in the context of (a) the mutual fund industry, (b) communications between non-party independent trustees and their independent counsel, or (c) the hundreds of Section 36(b) lawsuits filed in the 45 year history of Section 36(b).

Given the breadth of Plaintiff's argument, and the absence of supporting precedent, the Motion is notable for its lack of rigorous analysis of the "fiduciary exception" to the privilege and for its failure to discuss any of the broader implications of applying that idea to mutual fund trustees. Within this Circuit, the "fiduciary exception" has only been recognized in contexts much different from mutual funds organized as a business trust, such as claims against ERISA trustee defendants. Equally important, the Supreme Court has held that this narrow exception to traditional privilege law does not apply simply because a relationship is labeled a "trust." Further, Plaintiff, who purports to pursue this lawsuit "for the use and benefit of the PIMCO

1 Total Return Fund" and its shareholders, fully ignores the industry-destabilizing fallout—and the
 2 ensuing harm to himself and millions of mutual fund investors—that would result from revoking
 3 the protection of the attorney-client privilege from the thousands of independent trustees who
 4 have relied upon it to carry out their Congressionally mandated-role as "independent
 5 watchdogs," for the benefit of mutual fund shareholders. The Motion should be denied.

6 BACKGROUND

7 I. THE INDEPENDENT TRUSTEES AND THEIR INDEPENDENT COUNSEL

8 As Plaintiff recognizes, the Independent Trustees serve an important role as the
 9 "watchdogs" of PIMCO Funds, representing shareholder interests consistent with the complex
 10 statutory requirements of the Investment Company Act of 1940 ("ICA") and regulations
 11 implemented by the SEC. *See Mot.* (Dkt. No. 102) at 1; Declaration of Megan C. Johnson
 12 ("Johnson Decl.") ¶8.¹ Among other defined responsibilities, the Independent Trustees must
 13 annually review and approve the agreement between the PIMCO Funds, including the Total
 14 Return Fund, and their investment adviser, PIMCO. Johnson Decl. ¶8; 15 U.S.C. §80a-15(c).
 15 They undertake that important task with the assistance and advice of their independent counsel,
 16 Dechert LLP ("Dechert"). Johnson Decl. ¶6. Dechert has represented the Independent Trustees
 17 as their independent counsel since [REDACTED] and has represented the PIMCO Funds since [REDACTED]. *Id.*

18 The SEC has recognized that the engagement of independent counsel provides crucial
 19 support to the Independent Trustees in navigating the complex statutory and regulatory scheme
 20 applicable to mutual funds, especially with respect to transactions between the funds and their
 21 investment adviser and its affiliates—such as the renewal of the Advisory Agreement. Final
 22 Rule: Inv. Co. Governance, SEC Release No. IC-26520, File No. S7-03-04 (July 27, 2004), 2004
 23 WL 1672374 at *9 n.68; Final Rule: Role of Indep. Dirs. of Inv. Cos., SEC Release Nos. 33-
 24 7932, 34-43786, IC-24816, File No. S7-23-99 (Jan. 2, 2001), 2001 WL 6738 at *6 n.36; Johnson
 25 Decl. ¶11. SEC rules also mandate that the Independent Trustees annually determine that any

26
 27 ¹ Plaintiff's Motion opens with purported factual "background" that has little to do with whether Plaintiff has
 28 established an exception to the attorney-client privilege. The Independent Trustees will not respond to such
 statements except to correct those that relate to the application of the attorney-client privilege. *See* Johnson Decl.
 ¶13.

legal work their independent counsel performs for the investment adviser or its affiliates is sufficiently limited that it is unlikely to adversely affect counsel's professional judgment in representing the Independent Trustees. 17 C.F.R. §270.0-1(a)(6)(i)(A); Johnson Decl. ¶9. Consistent with that rule, the Independent Trustees annually assess Dechert's independence. Johnson Decl. ¶12. As part of that process, Dechert provides a memorandum to the entire Board containing material information to assist in the Independent Trustees' deliberations. *Id.* ¶12 & Ex. 1.

² *Id.* ¶13 & Ex. 1.

In the role of independent counsel, Dechert provides legal assistance and advice regarding the Independent Trustees' duties and responsibilities to the PIMCO Funds under federal and state law on a variety of topics critical to their function as Independent Trustees. Johnson Decl. ¶¶14-16.

Id. ¶¶17-20.

II. PLAINTIFF'S SUBPOENAS TO THE INDEPENDENT TRUSTEES

Plaintiff has sued PIMCO and PIMCO Investments for alleged violations of Section 36(b) of the ICA, 15 U.S.C. §80a-35(b), based on the fees they charged to the PIMCO Total Return Fund. *See, e.g.*, Compl. (Dkt. No. 1) ¶1. The Complaint alleges that the PIMCO Funds Board is composed of a "majority of ... 'disinterested' [trustees]" who "serve as 'watchdogs,'" to "oversee the fees charged with any eye solely to the benefit of the Fund and its shareholders." *Id.* ¶¶131, 132. However, the Independent Trustees are not defendants in this lawsuit, nor could they be, because Section 36(b) does not authorize a claim against them.

On November 30, 2015, Plaintiff served the Independent Trustees with non-party

² Plaintiff's Motion cites to

Mot. at 4.

1 document subpoenas (“Subpoenas”). *See* Declaration of David A. Kotler (“Kotler Decl.”) ¶4,
 2 Ex. 1. Plaintiff now claims that “[i]n response, the Independent Trustees … improperly
 3 assert[ed] that [certain documents] are protected by the attorney-client privilege,” Mot. at 2, but
 4 the Subpoenas did not assert any “fiduciary exception” or otherwise request production of
 5 privileged communications; instead, each Subpoena specifically recognized the Independent
 6 Trustees’ right to “withhold [] information or documents based upon a claim of privilege” and
 7 “claim privilege or protection as to part of a document.” *E.g.*, Kotler Decl., Ex. 1.a at Sched. A,
 8 Instrs. 2 & 3. To date, the Independent Trustees have produced over 2,000 pages of responsive,
 9 non-privileged documents and have provided detailed privilege and redaction logs. *Id.* ¶¶11-14.

10 In response to the Subpoenas, the Independent Trustees completed a careful and diligent
 11 review of their communications for privilege. The Independent Trustees did not assert privilege
 12 over (i) communications between Dechert and the entire Board of Trustees (which includes two
 13 interested trustees), and (ii) communications between Dechert and the Independent Trustees that
 14 did not pertain to the provision of legal advice. However, communications between Dechert and
 15 the Independent Trustees related to the provision of legal advice, or communications among
 16 Independent Trustees regarding legal advice requested or received from Dechert, were
 17 appropriately withheld or redacted. As properly disclosed in the Independent Trustees’ privilege
 18 and redaction logs, these included privileged communications related to the Independent
 19 Trustees’ review and approval of the Agreements; preparation for or information received in
 20 connection with Board or Committee meetings; board governance matters, including the
 21 retirement of two Independent Trustees and the consideration, selection, and integration of four
 22 new Independent Trustees; and the departures of William H. Gross and Mohamed El-Erian from
 23 PIMCO. *See* Lin Decl. Exs. 2 & 3.

24 [REDACTED]

25 [REDACTED] Johnson

26 Decl. ¶24.

27 ARGUMENT

28 Plaintiff contends that the Independent Trustees are required to disclose all privileged

1 communications between the Independent Trustees and their independent counsel pursuant to a
 2 purported “fiduciary exception” that cannot be reconciled with the statutory and regulatory
 3 scheme governing mutual funds. No court has ever applied the “fiduciary exception” to mutual
 4 fund trustees and the Court should reject Plaintiff’s invitation to be the first to do so. The
 5 Motion should be denied.

I. THE COMMUNICATIONS AT ISSUE INDISPUTABLY ARE PRIVILEGED

7 Plaintiff concedes that “there is no dispute that the information withheld and redacted . . .
 8 concerns advice sought or provided to the Trustees.” Mot. at 8. In fact, the requested relief is
 9 specifically predicated on the fact that the Independent Trustees’ privilege and redaction logs
 10 establish the withheld and redacted documents are “confidential disclosures between attorney[]
 11 and client[] made for the purpose of giving and receiving legal advice.” *Chandola v. Seattle*
 12 *Housing Auth.*, 2014 WL 4685351, at *2 (W.D. Wash. Sept. 19, 2014); *United States v. Ruehle*,
 13 583 F.3d 600, 607 (9th Cir. 2009); Mot. at 2 (“The descriptions of the challenged documents
 14 reveal that all of the contested documents purportedly contain advice or requests for advice from
 15 Dechert . . .”). Because Plaintiff does not dispute that the communications at issue are
 16 privileged (subject to their claimed application of the “fiduciary exception”), and because the
 17 Independent Trustees have not waived the privilege in any respect, the Independent Trustees
 18 need not present further evidence re-confirming that the privilege applies.³

II. THE INDEPENDENT TRUSTEES’ PRIVILEGED COMMUNICATIONS SHOULD REMAIN PROTECTED FROM DISCLOSURE

A. Application Of The “Fiduciary Exception” Against the Independent Trustees Is Wholly Incompatible With The Legal Framework Governing Mutual Funds

21 Plaintiff argues that the non-party Independent Trustees lose all protection of the
 22 attorney-client privilege simply because PIMCO Funds is organized as a trust and, thus, its
 23 independent directors are “trustees.” See Mot. at 6. As discussed below in Point II.B, the two
 24 cases Plaintiff cites do not support, let alone compel, that remarkable conclusion. To appreciate
 25 the illogic of the Motion, however, it bears emphasis that Plaintiff is asking this Court to

27 ³ The Independent Trustees nonetheless have satisfied their burden to establish the privilege by producing a privilege
 28 log that “enable[s] other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(ii); see *In re Grand Jury
Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).

1 recognize a blanket privilege exception that is antithetical to the statutory and regulatory scheme
 2 protecting the interests of millions of mutual fund shareholders.⁴

3 The ICA provides that investment companies must be governed by a board of trustees, at
 4 least 40% of whom must be independent. 15 U.S.C. §§80a-2, 80a-10. As the Supreme Court
 5 observed, “the structure and purpose of [the ICA] indicate that Congress entrusted to the
 6 independent directors . . . the primary responsibility for looking after the interests of the funds’
 7 shareholders.” *Burks v. Lasker*, 441 U.S. 471, 484-85 (1979). Most importantly, the ICA
 8 requires that the trustees negotiate and approve the fees paid to the “investment advisor [] or
 9 principal underwriter” on an annual basis, and charges the board with the crucial responsibility
 10 of promoting the shareholders’ best interests in this process. *See* 15 U.S.C. §80a-15(c). For this
 11 reason, the Supreme Court has further recognized that independent trustees serve as the
 12 “independent watchdogs” with respect to the relationship between the fund’s investment adviser
 13 and its shareholders. *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 348 (2010).

14 To carry out this “independent watchdog” role, among many other things, independent
 15 trustees work continuously throughout the year to monitor and assess the funds’ advisor and
 16 distributor. Mutual funds, especially those as successful as the Total Return Fund, can be quite
 17 large and their operation very complex (e.g., regulatory and internal compliance requirements,
 18 layered statutory and regulatory obligations). Hence, a critical aspect of the Independent
 19 Trustees’ “watchdog” role is the advice and assistance of independent legal counsel. Indeed, the
 20 SEC has expressly encouraged such reliance, *see* Final Rule: Inv. Co. Governance, SEC Release
 21 No. IC-26520, File No. S7-03-04 (July 27, 2004), 2004 WL 1672374 at *9 n.68 (“One of the
 22 most useful advisers independent directors should consider engaging is their own counsel.”), and
 23 specifically singled out the “independent directors’ access to independent counsel [as] of key

25 ⁴ Plaintiff admits its sole focus on this Motion is proving its claims (e.g., Mot. at 9), which are not against the
 26 Independent Trustees. However, whether the documents are “critical” to the litigation is not dispositive of whether
 27 the privilege is honored. *See Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998) (rejecting “balancing test”
 28 that would permit disclosure of privileged information that was “of substantial importance” because “a client may not
 know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter,
 let alone whether it will be of substantial importance” and such a test would “[introduce] substantial uncertainty into
 the privilege’s application”).

importance when directors address questions of appropriateness and legality . . . of proposed transactions between the fund and its . . . adviser" Final Rule: Role of Indep. Dirs. of Inv. Cos., SEC Release Nos. 33-7932, 34-43786, IC-24816, File No. S7-23-99 (Jan. 2, 2001), 2001 WL 6738 at *6 n.36. Courts assessing Section 36(b) claims have therefore consistently recognized that "[a]n important element of the independent director's informed state is the advice they received from their independent counsel." *In re Am. Mut. Funds Fee Litig.*, 2009 WL 5215755, at *54 (C.D. Cal. Dec. 28, 2009) (citations omitted).⁵

A necessary corollary of the SEC's and the courts' unambiguous endorsement of independent trustees' reliance on the legal advice of independent counsel is the recognition that communications with that counsel for the purposes of requesting and receiving such advice must be protected from disclosure by "the most sacred of all legally recognized privileges"—the attorney-client privilege. *United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (citations omitted). The privilege is essential for independent trustees to freely communicate questions regarding their review of the advisory agreement and other key fund governance issues, and for counsel to provide candid and thorough advice. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing that the "purpose" of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"). Thus, the privilege is essential to promoting shareholders' interest in a fully informed, conscientious board and a robust process for reviewing the advisory agreement. Or, to borrow from the Motion, the privilege undoubtedly helps the Independent Trustees carry out their "duty to ensure that their actions serve the best interests of the Fund's shareholders." Mot. at 1.

Conversely, without the protection of the privilege, independent trustees might forsake legal advice or otherwise stifle their conversations with counsel. *See Hunt v. Blackburn*, 128

⁵ *Accord Gartenberg v. Merrill Lynch Asset Mgmt. Inc.*, 694 F.2d 923, 927 (2d Cir. 1982) ("The trustees, who were represented by capable independent counsel, were found to be competent, independent and conscientious in the performance of their duties."); Op. at 53, 55, *Sivalella v. AXA Equitable Life Ins. Co.*, No. 11-cv-4194 (D.N.J. Aug. 25, 2016) (recognizing the "role as the Board's independent counsel" and finding the Board was "careful and conscientious in performing its duties"); *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962, 982 (S.D.N.Y. 1987) ("Another important resource was . . . the director's separate and independent legal counsel.").

1 U.S. 464, 470 (1888) (recognizing that legal advice “can only be safely and readily availed of
 2 when free from the consequences or the apprehension of disclosure”). Accordingly, if the Court
 3 accepts Plaintiff’s invitation to eviscerate the privileged relationship between independent
 4 trustees and their independent counsel, it will puncture Congress’s and the SEC’s reliance on
 5 well-informed, independent trustees to protect shareholders. *See Mett*, 178 F.3d at 1065 (“[A]n
 6 uncertain attorney-client privilege will likely result in [] trustees shying away from legal advice
 7 regarding the performance of their duties[, and that] outcome ultimately hurts beneficiaries
 8 [who] should prefer well-counseled trustees who clearly understand their duties.”). In other
 9 words, the privilege “exception” Plaintiff would have this Court announce under the pretense of
 10 shareholder interest would actually destabilize the mutual fund industry to the detriment of all
 11 shareholders.

12 **B. The “Fiduciary Exception” Recognized In ERISA Or Common-Law Trust
 13 Disputes Does Not Eliminate the Privilege Between Mutual Fund Independent
 14 Trustees And Their Independent Counsel**

15 No court has ever allowed a plaintiff asserting Section 36(b) claims to view privileged
 16 communications between independent trustees to a mutual fund and their independent counsel
 17 on the basis of a “fiduciary exception,” no matter whether the fund has been organized as a trust,
 18 a corporation, or other business entity.⁶ Plaintiff nonetheless asserts that the “fiduciary
 19 exception” recognized in *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999) and *United States
 20 v. Jicarilla*, 564 U.S. 162 (2011) applies to the Independent Trustees’ privileged
 21 communications in connection with their service to PIMCO Funds because PIMCO Funds is
 22 organized as a trust. *See Mot.* at 6. Nothing in these decisions establishes a blanket exception
 23 allowing anyone with “beneficiary” status access to otherwise privileged communications of a
 24 “trustee.”

25 To the contrary, the Supreme Court explicitly ruled out that notion in *Jicarilla* when it
 26 rejected applying a “fiduciary exception” in the context of the federal government’s relationship
 27 with Native Americans even “[t]hough the relevant statute denominates the relationship . . . a

28 ⁶ Indeed, that the fees for the Independent Trustees’ independent counsel are paid from trust assets (*see Mot.* at 6)—
 which is almost universally true in the mutual fund industry—has never been found a basis to warrant the application
 of the “fiduciary exception” to mutual fund trustees.

‘trust.’’⁷ 564 U.S. at 173-174. The Court held that since “that trust is defined and governed by statutes rather than the common law,” and “its carefully delimited trust responsibilities” under that statute lack “[t]he two features justifying the fiduciary exception—the beneficiary’s status as the ‘real client’ and the trustee’s common-law duty to disclose information about the trust”—the exception did not apply. *Id.* at 173-179. Far from supporting Plaintiff’s expansive interpretation of the “fiduciary exception,” *Jicarilla* thus underscores that the vitality of the attorney-client privilege does not turn merely on whether an entity is organized as a “trust.”

1. Massachusetts Business Trusts, Such As PIMCO Funds, Are Critically Different From ERISA Trusts

In *Mett*, the Ninth Circuit recognized a narrow fiduciary exception “in the ERISA context” where ““an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.” 178 F.3d at 1062-63. Nothing in that case, or any other, indicates that ERISA trusts, administrators, and beneficiaries are sufficiently analogous to mutual fund trusts, trustees, and shareholders to find ““the most sacred of all legally recognized privileges”” should be “disabled” in the mutual fund context. *Id.* at 1062.

And indeed they are not. Mutual funds organized as MBTs, like PIMCO Funds, are critically different from ERISA trusts. *Compare Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (“We have often noted that an ERISA fiduciary’s duty is ‘derived from the common law of trusts.’”), with *Richardson v. Clarke*, 372 Mass. 859, 861-62 (1977) (“Business trusts possess many of the attributes of corporations and for that reason cannot be governed solely by the rules which have evolved for traditional trusts.”). Plaintiff nevertheless would have this Court find that the label “trust” has talismanic effect, such that PIMCO Funds is directly analogous to an ERISA trust. Not so. PIMCO Funds holds hundreds of billions of dollars in assets, *see Compl.* ¶33, gathered from the voluntary contributions of millions of shareholders who can (and do)

⁷ Plaintiff argues against a strawman in claiming that the Independent Trustees “wrongfully rely on *Jicarilla* as support for their claim that mutual fund trustees are exempt from the application of the fiduciary exception.” Mot. at 7. The Independent Trustees’ pre-motion letter does not “rely” on *Jicarilla*, but only explains why Plaintiff was wrong to rely on that case in its pre-Motion letter to “support Plaintiff’s expansive interpretation of the ‘fiduciary exception.’” Lin Decl. Ex. 5, at 6.

1 purchase and sell fund shares with regularity, and is a member of the heavily-regulated and
 2 heavily-scrutinized mutual fund industry. PIMCO Funds thus bears scant resemblance to an
 3 ERISA trust—which typically contains assets related to an employer retirement plan for the
 4 benefit of a fixed set of beneficiaries (employees) who cannot transfer their interest.⁸ Equally
 5 important, the role of the Independent Trustees—fulfilling a governance function as
 6 “independent watchdogs” to the business—bears no relationship to an ERISA fiduciary
 7 administering the plan for employees.

8 **2. Massachusetts Business Trusts Are Also Critically Distinguishable From
 9 Common-Law Trusts**

10 A MBT such as PIMCO Funds also differs in a number of critical ways from a traditional
 common law trust, including:

- 11 • A MBT differs from a private trust “in the manner in which the trust relationship
 12 is created; investors in a business trust enter into a voluntary, consensual, and
 13 contractual relationship, whereas the beneficiaries of a traditional private trust
 take their interests by gift from the donor or settlor.” Chermside, *Modern Status*
of the Massachusetts or Business Trust, 88 A.L.R.3d 704, 720 (1978).
- 14 • Beneficial owners of MBT shares contribute their own funds to purchase shares,
 15 unlike common-law trusts in which a third party grantor or testator contributes
 assets, as in a testamentary or *inter vivos* trust. See *Hecht v. Malley*, 265 U.S.
 144, 146 (1924) (“The ‘Massachusetts Trust’ . . . consist[s] essentially of an
 16 arrangement whereby property is conveyed to trustees, in accordance with the
 terms of an instrument of trust, to be held and managed for the benefit of such
 17 persons as may from time to time be the holders of transferable certificates
 . . .”).
- 18 • MBTs have transferable shares, whereas common-law trusts typically do not.
 19 Mass. Gen. Laws ch. 182, §1; see *Hecht*, 265 U.S. at 146 (noting that
 20 shareholders receive “transferable certificates . . . showing the shares into which
 the beneficial interest in the property is divided,” which “resemble certificates for
 21 shares of stock in a corporation and are issued and transferred in like manner”).
- 22 • MBTs can convert into corporations and vice versa; and may merge with
 23 corporations. Mass. Gen. Laws ch. 156D, §§ 1.40, 9.50, 11.02. Common-law
 trusts cannot.

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 25
 26 ⁸ Compare *State St. Trust Co. v. Hall*, 311 Mass. 299, 302-303 (Mass. 1942) (recognizing that with a Massachusetts
 27 Business Trust “the transfer of beneficial interests . . . is readily and easily accomplished by the transfer of the
 28 shares”), with *Patterson v. Shumate*, 504 U.S. 753, 759 (1992) (“ERISA . . . clearly imposes a ‘restriction on the
 transfer’ of a . . . ‘beneficial interest’ in the trust.”), and 29 U.S.C. §1056(d)(1) (“[E]ach pension plan shall provide
 that benefits provided under the plan may not be assigned or alienated.”).

1 **3. The Rationale For Permitting The “Fiduciary Exception” In ERISA Or**
 2 **Common-Law Trusts Is Entirely Inapplicable To Independent Trustees Of**
 3 **Mutual Funds**

4 These fundamental differences are crucial, because as *Jicarilla* makes clear, the
 5 applicability of the fiduciary exception depends upon the legal sources (common law, state,
 6 federal) that structure the fiduciary obligations of the trustees and the rights of the trust’s
 7 beneficiaries. 564 U.S. at 173. Indeed, *Mett* recognized that the fiduciary exception “derives
 8 from” (1) “an ERISA trustee’s duty to disclose to plan beneficiaries all information regarding
 9 plan administration,” and (2) “the role of the trustee” such that “as a representative for the
 10 beneficiaries of the trust which he is administering, the trustee is not the real client in the sense
 that he is personally being served.”⁹ 178 F.3d at 1063. Neither rationale applies here.

11 As to disclosure, the rights and duties of the Independent Trustees and fund shareholders
 12 are governed by federal and Massachusetts law. The applicable law and regulations require that
 13 specified non-privileged information be disclosed to mutual fund shareholders (e.g., fund
 14 performance, certain fees charged, the fund’s investment objective, certain investment risks),⁹
 15 but this cabined duty does not provide a blanket obligation to disclose “all information,” which
 16 would eliminate the attorney-client privilege altogether. Simply put, there is no law, regulation
 17 or duty placed on the Independent Trustees to disclose the legal advice upon which they rely in
 18 fulfilling their legal obligations as trustees. *See Jicarilla*, 564 U.S. at 185 (finding no “general
 19 common-law duty to disclose all information related to the administration of [the] trusts”).¹⁰

20 Additionally, PIMCO Funds’ shareholders cannot be considered the “real clients” of
 21 Dechert. As a matter of common sense, they are not the persons “for whom [the] advice is
 22 intended” when Dechert advises the Independent Trustees on their own legally-mandated duties
 23 as trustees. *Id.* at 179. Likewise, the Independent Trustees are not mere agents of fund
 24 shareholders, such that the Court could find that Dechert abstractly represents the shareholders.
 25 It would be wholly inappropriate to consider Plaintiff the “real client” of the Independent
 26 Trustees’ independent counsel where, as here, the Independent Trustees navigate multiple legal

27 ⁹ E.g., 15 U.S.C. §80a-29(e) (reports to stockholders); 17 C.F.R. §270.30b1-5 (reports filed with the SEC).

28 ¹⁰ Massachusetts law also has not recognized the “fiduciary exception” with respect to a mutual fund organized as a
 MBT.

1 and regulatory obligations that they seek to manage in the interests of a fluid and always large
 2 number of voluntary shareholders.¹¹

3 Finally, in the limited circumstances in which the fiduciary exception has been applied, it
 4 served the purpose of preventing defendants from shielding breaches of their fiduciary duties
 5 from discovery. *See, e.g., United States v. Evans*, 796 F.2d 264, 266 (9th Cir. 1986). The
 6 Independent Trustees are not, and cannot be, defendants in this lawsuit. We are aware of no
 7 court in this Circuit applying the fiduciary exception to invade a privilege belonging to a third
 8 party. *See Mett*, 178 F.3d at 1065 (“[W]here attorney-client privilege is concerned, hard cases
 9 should be resolved in favor of the privilege, not in favor of disclosure.”).¹²

CONCLUSION

10 The protection of the attorney-client privilege encourages independent trustees to request
 11 and receive legal advice on important topics consistent with the exercise of their statutory and
 12 regulatory responsibilities as trustees, without requiring disclosure to the adviser, to
 13 shareholders, or to the public. In entering into the communications for which Plaintiff now
 14 seeks full disclosure,

15 [REDACTED]
 16 [REDACTED]
 17 The ruling that Plaintiff seeks—that there is effectively no attorney-client
 18 privilege applicable to communications between independent trustees of a mutual fund and their
 19 independent counsel with respect to legal advice received in serving as independent trustees and
 20 exercising their “independent watchdog” function—would not only run directly contrary to long-
 21 settled and accepted industry standards and practices, but would have a very harmful effect on
 22 the independent trustees to thousands of mutual funds, to the detriment of Plaintiff and millions
 23 of other mutual fund shareholders.

24 For the foregoing reasons, Plaintiff’s Motion to Compel should be denied.

25 _____
 26 ¹¹ Identifying the mutual fund’s shareholders as the real “client” of independent counsel also would raise ethical
 27 issues given that the myriad shareholders of a typical fund will never have met with that counsel, never acted to
 retain such counsel, and may have interests that conflict with that counsel’s other clients or fund shareholders.

28 ¹² Although the Ninth Circuit has not expressly recognized the “good cause” pre-requisite to applying the “fiduciary
 exception” recognized in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), *see Weil v. Inv./Indicators
 Research & Mgmt.*, 647 F.2d 18 (9th Cir. 1981), Plaintiff does not and cannot demonstrate good cause here.

1 DATED: October 3, 2016.

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PROOF OF SERVICE

I hereby certify that on 3rd day of October, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure:

DATED this 3rd day of October, 2016.

/s/Brendan T. Mangan
Brendan T. Mangan, WSBA No. 17231